

**UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
REGION 8**

**ACE HEATING & AIR CONDITIONING
CO., INC.**

and

CASES

08-CA-133965

08-CA-133967

08-CA-133968

**SHEET METAL WORKERS INTERNATIONAL
ASSOCIATION, LOCAL UNION NO. 33**

**ACE HEATING & AIR CONDITIONING
CO., INC.**

Employer

and

CASE

08-RC-127213

**SHEET METAL WORKERS INTERNATIONAL
ASSOCIATION, LOCAL UNION NO. 33**

Petitioner

**COUNSEL FOR THE GENERAL COUNSEL'S EXCEPTIONS
TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE (JD-03-15)**

Pursuant to Section 102.46(a) of the Rules and Regulations of the National Labor Relations Board, Counsel for the General Counsel respectfully files the following Exceptions to Administrative Law Judge (ALJ) Arthur J. Amchan's Decision dated January 15, 2015. Counsel for the General Counsel excepts to the following aspects of the Administrative Law Judge's Decision (ALJD):

1. The ALJ's failure to conclude that Respondent violated Section 8(a)(1) of the Act by threatening employees with plant closure if they voted for union representation, despite his findings that on May 14, 2014, Supervisor Ed Dudek, while passing out

- paychecks, told employees that at the direction of Respondent's owner Mitchell Stephens, Respondent would close its doors if the employees voted for union representation. (ALJD, p. 3, Lines 20-24, fn 4).
2. The ALJ's failure to find and conclude that Respondent threatened employees with plant closure and job loss if the employees voted for union representation. In support of this exception, the General Counsel relies upon the testimony of Ed Dudek, Laura Stephen, Chris Sikora, Joe Huckoby, Noble Hall and Brian Orosz. (Tr. 88-90, 422, 429-30, 154, 241, 276, 304)
 3. The ALJ's failure to find and conclude that Supervisor Dudek made unlawful threats of plant closure and job loss to employee if they voted for union representation where the threats to employees were accompanied by the name of Respondent's high ranking official, Mitchell Stephen. In support of this exception, the General Counsel relies upon the testimony of Ed Dudek, Joe Huckoby, Chris Sikora, Brian Orosz and Noble Hall. (Tr. 92-93, 154, 241-242, 276, 304)
 4. The ALJ's finding that "there was no discussion about the alleged threat (of plant closure and job loss) amongst employees". (ALJD, page 3, Lines 23-24) In support of this exception, the General Counsel relies upon the testimony of Joe Huckoby. (Tr. 156-157)
 5. The ALJ's failure to conclude that Respondent's owner Mitchell Stephen authorized Supervisor Ed Dudek to threaten employees with plant closure and job loss if they voted for union representation, despite his finding that, "Stephen told [Dudek] to pass this message along to employees on at least 5 occasions and that he did so." (ALJD, p. 3, Lines 31-33)

6. The ALJ's failure to make credibility findings based primarily upon witness demeanor and contrary to the clear preponderance of the evidence. (ALJD, *passim*)
7. The ALJ's failure to support his decision to credit Stephen's testimony over Dudek's testimony concerning Stephen authorizing and directing Dudek to threaten employees with plant closure and job loss, despite his finding that he, "did not find Dudek any more credible than Stephen." (ALJD, p. 3, Line 27-29)
8. The ALJ's finding, in the absence of any record evidence, about Supervisor Dudek's "motivation" when he informed employees about Stephen's threats of plant closure and job loss if they voted in support of union representation. (ALJD, p. 3, fn. 4)
9. The ALJ's finding, in the absence of any record evidence, that the Union instructed Supervisor Dudek to threaten employees with plant closure and job loss, "as part of a back-up plan for filing objections if the Union lost the election." (ALJD, p. 3, fn 4)
10. The ALJ's failure to conclude that that Respondent, through Supervisor Ed Dudek, unlawfully interrogated an employee in violation of Section 8(a)(1) despite his finding that, "on May 21, [Dudek] interrogated installer Fred Corbin as to how he was to vote." (ALJD, p. 4, Lines 1-2).
11. The ALJ's failure to credit the testimony of Supervisor Dudek that he interrogated employee Fred Corbin, despite no record evidence to contrary. (ALJD, p. 4, line 2)
12. The ALJ's failure to impute liability to the Respondent for Supervisor Dudek's unlawful interrogation of an employee, based upon his finding that, "he did not necessarily do so as an agent of Respondent." (ALJD, p. 4, line 4-5)

13. The ALJ's failure to support his credibility findings in crediting Stephen's testimony over Dudek's regarding Stephen telling Dudek that he would pay employees for their vote in the representation election. (ALJD, p. 4, Line 10-12)
14. The ALJ's failure to find that Stephen instructed Dudek to tell the guys if they wanted to take union jobs, take union jobs and leave him out of it. In support of this exception, the General Counsel relies upon the testimony of Ed Dudek and Laura Stephen. (Tr. 88, 422, 429-430)
15. The ALJ's failure to credit Dudek's testimony that, "he told employees that Mitch Stephen told him to tell [the employees] that if they wanted union jobs, to take union jobs, but leave Stephen 'out of it'" (ALJD, p. 4, fn 7)
16. Despite crediting testimony of James Mazzeo that he was told by Supervisor Dudek that Stephen would pay employees vote against union representation, the ALJ's failure to conclude that Respondent offered to pay employees to vote against union representation in violation of Section 8(a)(1). (ALJD, p. 4, Lines 14-15; fn. 7)
17. Despite his finding that, "Respondent gave raises to installers Fred Corbin and Steve Sarosy after the election" and while post-election objections were pending, the ALJ's failure to conclude that Respondent unlawfully granted post-election wage increases to employees to dissuade employees from supporting the Union in violation of Section 8(a)(1) of the Act (ALJD, p. 4, Lines 15-16)
18. The ALJ's finding that Supervisor Dudek did not tell any employees other than James Mazzeo about Stephen's offer to pay employees to vote against union representation. (ALJD, p. 4, Line 15). In support of this exception, the General Counsel relies upon the testimony of Ed Dudek. (Tr. 96-97)

19. The failure to find that Respondent developed a plan to offer pay raises to employees prior to the critical period of the election. In support of this exception, the General Counsel relies upon the testimony of Mitchell Stephen. (Tr. 335-336, 396-98)
20. Despite his finding that a week after the union election and “after the Union filed its objections to the conduct affecting the results of the election, Mitchell Stephen told Jimmy Mazzeo that he planned to give employees raises but was going to hold off until the representation issues were resolved”, the ALJ’s failure to conclude that Respondent violated Section 8(a)(1) by unlawfully informing employees that scheduled wage increases are denied in order to discourage employees’ union activities, (ALJD, p. 4, Lines 20-24)
21. The ALJ’s reliance upon agency principles for determining whether the Respondent is liable for the coercive statements and conduct of a statutory supervisor. (ALJD, p. 4-6)
22. The ALJ’s failure to apply caselaw that, “the Board has always imputed liability to their employer’s coercive remarks by statutory supervisors, without further inquiry into their agency status.” *See e.g., Storer Communication*, 294 NLRB 1056, 1077 (1989)
23. The ALJ reliance upon National Apartment Leasing, 272 NLRB 197 (1984) for the proposition that the Board adopted the Third Circuit’s framework that there is a rebuttable presumption that a Respondent is liable for a supervisor’s coercive statements of whether the supervisor is “reasonably viewed by his listening employee colleagues as speaking on behalf of management.” (ALJD, p. 5, fn. 9) The ALJ fails to acknowledge that the Board does not accept the Third Circuit’s approach in other

- cases when attributing liability to Respondent for the coercive statements and conduct of a statutory supervisor. Storer Communication, 294 NLRB 1056, 1077 fn. 44 (1989)
24. The finding, in the absence of record evidence that Supervisor Dudek was actively involved on behalf of the Union. (ALJD, p. 5, Line 13)
25. The ALJ's failure to find that Supervisor Dudek lacked the apparent authority of Respondent in making statements on its behalf, despite the finding that employees, "reasonably believed that [Dudek] was speaking for management." (ALJD, p. 5, Lines 20-21)
26. The finding that employees "did not believe that Dudek was speaking on behalf of Stephen, or that Stephen had told Dudek to threaten them with job loss." (ALJD, p. 5, p. Lines 36-38)
27. The finding, in the absence of record evidence, that the "Union considered Dudek to be operating on its behalf and not on Respondent's." (ALJD, p. 6, Line 1)
28. The ALJ's conclusion that "Dudek was not acting as Respondent's agent when making all the statements alleged to violate Section 8(a)(1)." (ALJD, p. 6, Lines 8-9)
29. The finding that "Mitch Stephen told [James Mazzeo] that he was not changing employees compensation or giving raises until the union representation issue was resolved." (ALJD, p. 6, Lines 17-19)
30. The failure by the ALJ find a Section 8(a)(1) violation when Stephen told Mazzeo that employees were scheduled to receive raises but that Respondent was withholding pay increases because the Union contested the election results. In support of this

exception, the General Counsel relies upon the testimony of James Mazzeo. (Tr. 175-176)

31. The finding that “Respondent gave out wage increases in a ‘haphazard fashion’” (ALJD, p. 6, Lines 30-31)
32. The failure to find that prior to the critical period, Respondent considered a plan to give employees wage increases and that Respondent “had an idea” of the amount of pay increases to offer employees. In support of this exception, the General Counsel relies upon the testimony of Mitchell Stephen. (Tr. 337-338)
33. The ALJ’s error in analyzing the post-election wage increase issued to employees utilizing a Section 8(a)(5) framework and his failure to analyze such wage increases as an 8(a)(1) violation. (ALJD, p. 6-7, *passim*)
34. The ALJ’s failure to find and conclude that that the unfair labor practices do not amount to objectionable conduct and violations of Section 8(a)(1). (ALJD, p. 7, lines 22-24; *passim*)
35. The ALJ’s failure to find and conclude that the serious and pervasive unfair labor practices warrants a *Gissel* bargaining order (ALJD, p. 7, lines 22-24; *passim*)
36. The finding that the complaint is dismissed. (ALJD, p. 7, line 30; *passim*)

Dated at Cleveland, Ohio this 12th day of February 2015.

Respectfully submitted,

/s/ Rudra Choudhury

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PROOF OF SERVICE

A copy of the foregoing Exceptions to the Decision of the Administrative Law Judge (JD-03-15) was sent on February 12, 2015, to the following individual by electronic mail and where electronic mail is unknown, by regular mail:

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